

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

---

Volume 7 | Issue 6

---

2024

© 2024 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

---

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Confronting the Paper Tiger: Pluralism in India's Corporate Jungle

---

PRANAV PAI<sup>1</sup>

## ABSTRACT

*Amidst the conundrum of determining which model of corporate governance is ideally suited for companies, India has adopted the pluralistic model as a guiding principle of company law. Enshrined in Section 166(2) of the Companies Act, 2013, the pluralistic approach recognises the multi-fiducial duties of directors towards various stakeholder interests and places them on par with the interests of shareholders. The significance of the pluralistic approach is vast - its legal codification recognises and takes into account stakeholder interests without creating a hierarchy. Further, the model is closely tied to the concept of Corporate Social Responsibility (CSR) and aligns with the constitutional ideal of a pluralistic society.*

*While the pluralistic approach is important in principle and notable in theory, its practical application suffers from various loopholes which renders it a paper tiger in the law. In addition to highlighting prevailing arguments of ineffective implementation, lack of redressal for stakeholders and ambiguity in the language of the provision, this paper aims to focus on the three main agency problems in companies which undermine the purpose and efficacy of the pluralistic approach as outlined in Section 166(2). Further, these lacunae can lead to a neglect of overall company benefit and promote unscrupulous practices that prioritise individual interests as evidenced by real world instances and case precedents. Therefore, there is a pressing need to formulate fine-tuned solutions so as to plug the prevalent loopholes in the pluralistic model, until which time the quest for perfection remains.*

**Keywords:** *Pluralistic Model, Stakeholders, Companies Act, CSR, Section 166(2), Corporate Governance, Directors, Shareholders.*

## I. INTRODUCTION

Corporate governance lies at the core of every company's functioning<sup>2</sup>, goals, management and business ethics and ultimately determines its long-term survival and success. Over the years, the significance and focus on corporate governance has grown, with various internal and

---

<sup>1</sup> Author is a student at Jindal Global Law School, India.

<sup>2</sup> Athena Rebello, *Corporate Governance in India: Objectives, History, Regulatory Framework, Examples*, CLEAR (Jun. 19, 2024, 18:10 PM), <https://cleartax.in/s/corporate-governance-in-india>

external stakeholders holding their own set of rights and interests in the company<sup>3</sup>. Due to the involvement of numerous stakeholders with their varying and sometimes conflicting rights and interests, directors of companies are tasked with answering the crucial question - “in whose interests should companies be run<sup>4</sup>?” while determining the approach and framework of corporate governance to be followed by the company. The conundrum is further complicated as the two major divergent approaches of corporate governance<sup>5</sup>, i.e., the shareholder approach and the stakeholder approach have their own advantages and disadvantages, coupled with the obligation and duty imposed on directors to balance the interests of various parties<sup>6</sup>.

While the enlightened shareholder value (ESV) or shareholder approach adopted by the United Kingdom<sup>7</sup> places stakeholder interests as a means to achieve shareholder interests and thus creates a prioritisation of interests wherein the latter is on the top of the ladder, the pluralistic or stakeholder approach creates no such hierarchy of interests<sup>8</sup>. Imbued in Section 166(2) of the Companies Act, 2013<sup>9</sup>, India has adopted the pluralistic approach as a preferred position of corporate governance<sup>10</sup>, which will be the focus of this paper. This approach recognises the diverse fiduciary duties of directors towards various stakeholders and places these responsibilities on an equal footing with the interests of shareholders, thus not sacrificing one for the other. Hence, the long-standing dilemma faced by directors as to which approach of corporate governance must be chosen seems to be solved to an extent. However, the current reality in the corporate world is not as simple as it appears.

### **(A) Overview, Research Problem and Aims**

The cementing of the pluralistic approach in Section 166(2) has significantly contributed to corporate law and governance in India. Its legal codification acknowledges and considers stakeholder interests without establishing a hierarchy and is closely tied to the concept of

---

<sup>3</sup> Manjit Singh, 37. *Corporate Governance*, INFLIBNET (Sep. 20, 2024, 18:00 PM), <https://ebooks.inflibnet.ac.in/mgmt12/chapter/corporate-governance/>

<sup>4</sup> Research Report 125 COLLISON, CROSS, FERGUSON, POWER AND STEVENSON, *SHAREHOLDER PRIMACY IN UK CORPORATE LAW: AN EXPLORATION OF THE RATIONALE AND EVIDENCE* pg. 5 (ACCA, 2011).

<sup>5</sup> Ideals Board Team, *Understanding the difference between shareholder and stakeholder*, BOARD (Feb. 9, 2024, 17:15 PM), <https://idealsboard.com/comparing-shareholder-and-stakeholder-models-of-corporate-governance/>

<sup>6</sup> Tushar Rana, *Directors' Duties and Liabilities in Indian Companies: A Comparative Analysis*, LAWCTOPUS (Aug. 26, 2024, 15:07 PM), <https://www.lawctopus.com/academike/directors-duties-and-liabilities-in-indian-companies-a-comparative-analysis/#:~:text=Specific%20Fiduciary%20Duties%20Imposed%20on%20Directors%20in%20Indian%20Law&text=Directors%20are%20required%20to%20act,the%20interests%20of%20all%20stakeholders.>

<sup>7</sup> Companies Act 2006, c. 46, § 172 (UK).

<sup>8</sup> Naniwadekar and Varottil, *The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis*, NUS Working Paper 2016/006 NUS LWPS 1, 2 (2016).

<sup>9</sup> The Companies Act, 2013, Act No. 18, Acts of Parliament, 2013, § 166(2).

<sup>10</sup> Varottil, *Shareholder Stewardship in India: The Desiderata*, NUS Law Working Paper 2020/005 NUS LWPS 1, 18 (2020).

Corporate Social Responsibility (CSR), which advocates for equitable growth, development, sustainability and profitability of all parties in the corporate sphere. Finally, in a democracy such as India, the pluralistic approach is also in line with the constitutional ideal of a pluralistic society.

While the significance of Section 166(2) is vast, its mere codification without practical application or effective implementation renders it a mere paper tiger in the law. Existence of some documented loopholes such as ineffective implementation, lack of redressal for stakeholders and ambiguity in the language of the provision without any foreseeable solutions for the same undermines the purpose and efficacy of the Section. In addition to these loopholes, this paper seeks to address the issue of how the three major agency problems in companies obstruct the very principle and theory of the pluralistic approach and to what extent do they hinder the performance of director's duties under Section 166(2)?

This research paper aims to provide a thorough analysis of the pluralistic approach outlined in Section 166(2) of the Companies Act, 2013 by examining its significance and major loopholes, supported with real-world examples to bolster the author's arguments. Additionally, the paper will include recommendations for addressing the shortcomings in this provision, with the aim of taming the corporate paper tiger.

### **(B) Significance of Corporate Pluralism in Contemporary India**

The historical role of companies and duties of directors extending beyond the objective of mere profit maximization to include serving the public<sup>11</sup> and considering the interests of various "non-shareholder groups"<sup>12</sup> has expanded significantly, becoming a fundamental and crucial aspect of contemporary company law.

In India, the substance of this pluralistic theory has been highlighted in past case precedents like *National Textile Workers v. P.R. Ramkrishnan and Ors.*<sup>13</sup>, where the Court held that a company is a social institution having duties and responsibilities towards the community and *Chetan G Cholera v. Rockwool Ltd.*<sup>14</sup>, wherein it was held that a company is a living, dynamic social organism, deeply affiliated to the community it operates in. Further, the Standing Committee on Finance in its comment<sup>15</sup> on the 2009 provision recognised the fiduciary duty of

---

<sup>11</sup> George Shepherd, *Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders*, 23(3) UPJBL 823, 823 (2021).

<sup>12</sup> Mrabure and Abhulimhen-Iyoha, *Corporate Governance and Protection of Stakeholders Rights and Interests*, 11(1) BLR 292, 293 (2020).

<sup>13</sup> *National Textile Workers v. P.R. Ramkrishnan and Ors.*, (1983) 1 S.C.C. 228.

<sup>14</sup> *Chetan G Cholera v. Rockwool Ltd.*, 2009 S.C.C. OnLine AP 1072.

<sup>15</sup> LOK SABHA SECRETARIAT, THE COMPANIES BILL, 2009 (MINISTRY OF CORPORATE AFFAIRS) VOLUME I—REPORT pg. 170 (2010).

directors towards stakeholders as distinct<sup>16</sup> from the duty owed to shareholders and the company against the backdrop of CSR. Additionally, the Dr. J.J. Irani Committee Report on Company Law<sup>17</sup> noted that directors must have a “duty to have regard to the interest of the employees, etc”.

Keeping the above in mind, the significance of the pluralistic approach can be evidenced by the current corporate governance policies of companies; for example, SBI Life Insurance Company Limited<sup>18</sup> believes that profitability should align with responsibility towards employees, stakeholders and society while Berger Paints India Limited<sup>19</sup> considers the enterprise and society to be mutually dependent, with industry growth linked to the country’s development, environment and people. The following sections underscore the critical importance and necessity of adopting the pluralistic approach in India.

## II. FORMALIZING THE PLURALISTIC APPROACH THROUGH LEGAL CODIFICATION

Codification of the duties of directors in Section 166(2) not only provides legal recognition to the pluralistic approach, but also formally takes into account the interests of various stakeholders like members, employees, community and the environment. The importance of legal codification and the rights that flow from it can be summed up by the judgement in *State of Rajasthan & Ors. v. Union of India*<sup>20</sup>, which held that “legal rights are correlative of legal duties” and “are interests (here, of stakeholders) which the law protects by imposing corresponding duties on others (here, directors)”. Further, codification provides more clarity and to an extent, reduces subjectivity<sup>21</sup> while assessing the performance or negligence of director’s duties, thus benefitting regulatory bodies<sup>22</sup> like Courts, company tribunals like NCLT and NCLAT, auditors and investigation officers.

### (A) Elimination of Hierarchy of Interests

Section 166(2) obligates directors to act in good faith to promote the company’s objectives for the benefit of all members as a whole *and* in the best interests of various stakeholders like its

---

<sup>16</sup> Souvik Ganguly, *Directors’ duties in India: Shareholders or Stakeholders?*, ACUITY LAW (Apr. 8, 2024, 15:47 PM), <https://acuitylaw.co.in/directors-duties-in-india-shareholders-or-stakeholders/>

<sup>17</sup> MINISTRY OF COMPANY AFFAIRS, REPORT OF THE EXPERT COMMITTEE ON COMPANY LAW (2005) pg. 44 (2005).

<sup>18</sup> The CSR Journal, *Top 100 companies in India for CSR and Sustainability in 2022*, CSR (Jan. 30, 2023, 13:46 PM), <https://thecsrjournal.in/top-companies-india-csr-sustainability-2022/>

<sup>19</sup> *ibid.*

<sup>20</sup> *State of Rajasthan & Ors. v. Union of India*, 1978 S.C.R. (1) 1.

<sup>21</sup> Shivangi Gupta, *Directors Duties In India: A Critical Analysis*, IBC LAWS (May 11, 2023, 16:59 PM), <https://ibclaw.in/directors-duties-in-india-a-critical-analysis-shivangi-gupta/>

<sup>22</sup> *Codification of Directors’ Duties: Is Common Law Excluded?*, NDA (Sep. 21, 2024, 17:01 PM), [https://www.nishithdesai.com/Content/document/pdf/Quotes/Directors\\_Duties\\_Is\\_Common\\_Law\\_Excluded.pdf](https://www.nishithdesai.com/Content/document/pdf/Quotes/Directors_Duties_Is_Common_Law_Excluded.pdf)

employees, shareholders, the community and the environment. In *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd.*<sup>23</sup>, it was held that under Section 166(2), a director's duty was a "combination of private interest and public interest", and that he/she had an obligation to protect the environment along with the duties to (i) promote the benefit of all members in line with company objectives and (ii) act in the best interests of the company, its employees, shareholders and the community. Hence, it can be inferred that there is no hierarchy of interests or fiduciary duties owed by directors to shareholders and stakeholders; rather, they are separate duties which complement one another in order to promote the objects and best interests of the company. In striking this balance of equal consideration between shareholder and stakeholder interests to meet the company's objects, all three entities benefit equally, *prima facie* preventing any neglect of interests.

A key example is the share-based benefit schemes for employees of Tata Motors<sup>24</sup>, which effectively aligns employee (stakeholder) interests with the company's objectives. This results in enhancing shareholder value by incentivizing employees to contribute to the company's growth, allowing them to participate in its success and create long-term wealth, thus complementing and promoting all interests.

### **(B) Intersection of Pluralism and Corporate Social Responsibility (CSR)**

By recognising and imposing a duty on directors to serve the best interests of shareholders and various stakeholders like employees, environment and the community at large, the pluralistic approach in Section 166(2) is closely interconnected to the concept of CSR given in Section 135 of the Companies Act, 2013<sup>25</sup>. As mentioned by the Chairman of the CSR Committee while drafting the Corporate Social Responsibility Rules<sup>26</sup> under Section 135, the very foundation of CSR revolves around the relationships of an organisation with stakeholders for common good and the process of merging economic, environmental and social goals with the overall company objectives.

This can also be supported by the precedents of *Yashodhara Shroff v. Union of India*<sup>27</sup>, where the Court while discussing CSR emphasized on the need for "protection of the interests of the investors and other stakeholders", *Ramdas Janardan Koli v. Secretary, Ministry of Environment*

---

<sup>23</sup> *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd.*, (2021) 9 S.C.C. 449.

<sup>24</sup> TATA MOTORS, GROWING RESPONSIBLY - 79TH INTEGRATED ANNUAL REPORT 2023-24 pg. 500 (2024).

<sup>25</sup> The Companies Act, 2013, Act No. 18, Acts of Parliament, 2013, § 135.

<sup>26</sup> Ms. Mani Goswami, *A study on implications of CSR rules under Companies Act, 2013*, XVI Annual Conference Proceedings 4 301, 306 (2015).

<sup>27</sup> *Yashodhara Shroff v. Union of India*, 2019 S.C.C. OnLine Kar 682.

*and Forests*<sup>28</sup>, which held that CSR is a management concept integrating social and environmental concerns and stakeholder interactions with the day-to-day functioning of the business and *Nishikant Dubey v. Union of India*<sup>29</sup>, which held that under the concept of CSR in Section 135, companies in addition to undertaking business operations, have a sense of social responsibility towards the citizens of India. Finally, in *M.K. Ranjitsinh v. Union of India*<sup>30</sup>, the Court analysed Sections 135 and 166(2) and held that directors must act in good faith and in the best interests of both the company *and* stakeholders like the environment. Hence, the intersection of the pluralistic approach and CSR has several positive impacts not only on the overall long-term performance of a company, but also on internal and external stakeholders and overall society<sup>31</sup>.

### (C) Corporate Pluralism through the Constitutional Lens

On attaining independence, India adopted a pluralistic Constitution<sup>32</sup> and envisaged a society where the interests and rights of individuals belonging to various social, cultural, religious and political denominations were equally recognised, protected and upheld. In *Navtej Singh Johar v. Union of India*<sup>33</sup>, it was held that the Constitution of India was founded on the “vision of an inclusive society which accommodates plural ways of life” and that the recognition of “social, economic and legal interests of every individual” came under the umbrella of equality guaranteed by Article 14 of the Indian Constitution<sup>34</sup>.

Keeping this in mind, parallels can be drawn between the corporate pluralistic approach and the Constitutional ideal of a pluralistic society as both concepts reflect the need to recognise diverse interests of various stakeholders and not just a select few, while advocating for equitable growth and development of all parties. For example, oil company Shell<sup>35</sup> has a comprehensive stakeholder engagement process under which it directly engages with diverse stakeholders like customers, governments, business partners and investors in addition to company members (shareholders) to gather and understand stakeholder interests and viewpoints. In a democracy like India, the corporate pluralistic approach in Section 166(2) is desirable as it promotes the

---

<sup>28</sup> Ramdas Janardan Koli v. Secretary, Ministry of Environment and Forests, 2015 S.C.C. OnLine NGT 4.

<sup>29</sup> Nishikant Dubey v. Union of India, 2023 S.C.C. OnLine Jhar 2513.

<sup>30</sup> M.K. Ranjitsinh v. Union of India, (2021) 15 S.C.C. 1.

<sup>31</sup> Mohammad Asif Ahmadi, *Positive Outcomes of Corporate Social Responsibility for Companies and Society*, IJAR IJEBM 10(2) 74; 81,84-85 (2024).

<sup>32</sup> Colonel Balwan Singh Nagial, *India: A unique illustration of pluralism*, TOI (Apr. 28, 2022, 19:57 PM), <https://timesofindia.indiatimes.com/blogs/col-nagial/india-a-unique-illustration-of-pluralism/>

<sup>33</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1.

<sup>34</sup> INDIA CONST. art. 14.

<sup>35</sup> Shell Company, *Principal decisions and stakeholders - Annual Publications*, SHELL (Sep. 21, 2024, 23:06 PM), <https://reports.shell.com/annual-report/2023/strategic-report/principal-decisions-and-stakeholders.html>

ideal and vision of the Constitution of a pluralistic society by taking everyone's interests into account without creating a hierarchy between them.

### III. PREVAILING PROBLEMS IN THE PLURALISTIC PROVISION

Though *prima facie* Section 166(2) broadly covers the interests of various stakeholders under the pluralistic approach, several prevailing and unsolved problems obscure any real teeth<sup>36</sup> of the provision, rendering it a toothless paper tiger. Before this paper focuses on the main issue posed by agency problems, a cursory overview of these prevailing issues will be presented along with relevant case laws.

#### (A) Ambiguity in the Provision's Language

Section 166(2) mentions a limited number of broad stakeholder groups like employees, the community and the environment, without providing a pinpoint definition of these parties or the term 'stakeholder' itself. This vagueness in the language raises twin issues of identifying the exact parties to whom directors owe a duty<sup>37</sup> and protection of only "larger public interest"<sup>38</sup> by use of the terms "community" and "environment". This lack of definition subjects Section 166(2) to diverse interpretations and makes it overly expansive, which poses an obstacle in understanding the legislative intent and implementation. As held in *Union of India v. Delhi Gymkhana Club*<sup>39</sup>, the term public interest "cannot be stretched too far" to include the entirety of Indian society but specifically to that section whose rights and well-being is impacted by the company.

#### (B) Lack of Redressal for Stakeholders

The absence of any provision in the Companies Act for enforcement of stakeholder interests<sup>40</sup> coupled with the exclusion of stakeholders from redressal remedies<sup>41</sup> like derivative actions, oppression and mismanagement applications<sup>42</sup> and class action suits<sup>43</sup> poses a major challenge to the effectiveness of Section 166(2). Further, other impediments in redressal mechanisms like presumption of burden of proof in favour of directors<sup>44</sup> and fulfilment of numerical thresholds

---

<sup>36</sup> *ibid* 7, pg. 3.

<sup>37</sup> Sakshat Bansal & Ananya Vajpeyi, *The Warning of an Ambush: Disarming and Appeasing Activist Shareholders*, 2021 - Winter Issue ILIR 157, 165 (2021).

<sup>38</sup> *ibid* 7, pg. 14.

<sup>39</sup> *Union of India v. Delhi Gymkhana Club*, 2021 S.C.C. OnLine NCLAT 76.

<sup>40</sup> Deva Prasad M, *Companies Act, 2013: Incorporating Stakeholder Theory Approach into the Indian Corporate Law*, 39 (3) SLR 292, 300 (2017).

<sup>41</sup> Mahak Agarwal, *Class Action Suits in India: A Journey of Challenges and Potential*, VKC (Jul. 30, 2024, 16:41 PM), <https://vinodkothari.com/2024/07/class-action-suits-in-india-a-journey-of-challenges-and-potential/>

<sup>42</sup> The Companies Act, 2013, Act No. 18, Acts of Parliament, 2013, § 241 and § 242.

<sup>43</sup> The Companies Act, 2013, Act No. 18, Acts of Parliament, 2013, § 245.

<sup>44</sup> *ibid* 36.



in class action suits<sup>45</sup>; uncertainty and confusion in judicial application of derivative suits<sup>46</sup> (as seen in *ICP Investments (Mauritius) Ltd v. Uppal Housing Pvt Ltd*<sup>47</sup>); procedural complexities and lack of concrete principles for enforcement of fiduciary duties of directors<sup>48</sup> lead to failure of the provision in bestowing a sword of retribution in stakeholder hands<sup>49</sup>.

### (C) Hiding behind the Good Faith Shield

Under Section 166(2), directors are expected to “act in good faith in order to promote the objects of the company” while considering the benefit and interests of both shareholders and stakeholders. However, the subjective standard of good faith followed in India<sup>50</sup> while judging performance of directors’ duties circumvents the obligation of directors in considering stakeholder interests under the pluralistic approach. The subjective standard considers directors to have acted in good faith if they act in what *they* believe to be in the company’s best interest and stakeholder interests<sup>51</sup>, even if they neglect or ignore the latter. Further, in *Turner Morrison & Co. v. Shalimar Tar Products*<sup>52</sup>, “good faith” was construed to mean that the primary endeavour of directors is the “benefit of the company<sup>53</sup>” while in *Needle Industries and Ors. v. Needle Industries Ltd*<sup>54</sup>, it was held that directors enjoy complete discretion to take management decisions as long as they are made in good faith.

Hence, it can be inferred that under this wide discretion of decision making enjoyed by directors, stakeholders will be rendered helpless if directors wield the wide-encompassing shield and

---

<sup>45</sup> Piyush Senapati, *Protection of the Environment as Envisioned in Section 166(2) of the Companies Act- a Dead Letter?*, CBLT (Jun. 17, 2023, 21:52 PM), <https://www.cbltrgnul.in/post/protection-of-the-environment-as-envisioned-in-section-166-2-of-the-companies-act-a-dead-letter>

<sup>46</sup> Anurag Tiwari, *Shareholder Derivative Action Suits in India: Avoiding the Influence of Foss v. Harbottle and Taking Cue from the UK Law*, SCC (Aug. 10, 2022, 21:59 PM), <https://www.sconline.com/blog/post/2022/08/10/shareholder-derivative-action-suits-in-india-avoiding-the-influence-of-foss-v-harbottle-and-taking-cue-from-the-uk-law/>

<sup>47</sup> *ICP Investments (Mauritius) Ltd v. Uppal Housing Pvt Ltd*, 2019 S.C.C. OnLine Del 10604. (See also Harsh Tomar, *Confused Jurisprudence on Derivative Actions in India*, CBCL (Aug. 13, 2022, 21:53 PM), <https://cbcl.nliu.ac.in/company-law/confused-jurisprudence-on-derivative-actions-in-india/>)

<sup>48</sup> Kumar and Verma, *Protection of stakeholders’ interests in the Indian corporate landscape: examining the “ifs and buts”*, 8(2) ILR 142, 154-155 (2024).

<sup>49</sup> Priya Garg, Anamika Dudvani and Namrata Rawat, *SEBI’s recent amendments relating to Independent Directors: Should Nominee Directors be next?*, BAR AND BENCH (Aug. 22, 2021, 10:26 AM), <https://www.barandbench.com/columns/sebi-amendments-independent-directors-nominee-directors-be-next>

<sup>50</sup> Piyush Senapati, *Stuck on Subjectivity: Envisioning an Alternate Assessment of Director’s Good Faith Duty*, IRCCL (Apr. 8, 2023, 01:23 AM), <https://www.irccl.in/post/stuck-on-subjectivity-envisioning-an-alternate-assessment-of-director-s-good-faith-duty>

<sup>51</sup> Rituraj Singh Parmar and Priyam Indurkha, *When a Rights Issue becomes Oppressive: A Look at Byju’s Recent Controversy*, INDIA CORP LAW (Jul. 6, 2024, 01:26 AM), <https://indiacorplaw.in/2024/07/when-a-rights-issue-becomes-oppressive-a-look-at-byjus-recent-controversy.html>

<sup>52</sup> *Turner Morrison & Co. v. Shalimar Tar Products*, (1980) 50 Comp Cas 296 (Cal).

<sup>53</sup> Gautam Sundaresh, *In Whose Interests Should a Company be Run? Fiduciary Duties of Directors During Corporate Failure in India: Looking to the West for Answers*, 8(2) MBELR 291, 349 (2019).

<sup>54</sup> *Needle Industries (India) Ltd. and Ors. v. Needle Industries Newey (India) Holding Ltd.*, (1981) 3 S.C.C. 333.

defence of acting in good faith<sup>55</sup> for overall company benefit.

#### **(D) The Three Strikes of Agency Problems**

The presence, contribution and active role of various parties like shareholders, directors and diverse stakeholders towards the company can often times lead to a ‘conflict of interests.’ This can take place between insider or outsider parties across multiple levels in the company’s hierarchy, leading to agency problems in the company. In this regard, there have been three major agency problems<sup>56</sup> which have been identified by scholars in the corporate field: (1) Conflict between the firm’s owners (shareholders) and hired directors (AP-1), (2) Conflict between majority shareholders and minority shareholders (AP-2) and (3) Conflict between the firm and other third-party stakeholders (AP-3).

In the following sections, this paper will argue how each of these three agency problems compromise the overall benefit of the company while undermining the interests of shareholders and stakeholders, thus posing a major roadblock to the pluralistic approach and hindering directors from performing their duties under Section 166(2).

##### **1. Conflict between the firm’s owners (shareholders) and hired directors (AP-1)**

Under AP-1, the directors of the company appointed by the shareholders prioritize and take managerial decisions for their own interests and personal gains in contravention of shareholder interests. This conflict of interest undermines the pluralistic approach in Section 166(2) as it neglects *both* shareholder interests and indirectly, stakeholder interests and ultimately the company itself. Further, even though Section 166(4)<sup>57</sup> mandates directors to not participate in situations which might have conflicting interests with the company, there have been instances of AP-1 leading to failure of the pluralistic approach, thereby undermining the company’s objects along with shareholder and stakeholder interests.

The negative impact of AP-1 on the pluralistic approach is evident in the case of Kingfisher Airlines and its ex-Chairman and ex-Managing Director, Vijay Mallya, who exploited his position for personal gain. Initially, Mallya gained the trust of shareholders, investors and the public through “secret profits and undisclosed dealings,” creating the illusion of profitability despite massive constant losses<sup>58</sup>. Soon after, Kingfisher’s mounting debt led to non-payment

---

<sup>55</sup> The Companies Act, 2013, Act No. 18, Acts of Parliament, 2013, § 456.

<sup>56</sup> Armour, Hansmann and Kraakman, *Agency Problems, Legal Strategies, and Enforcement*, Discussion Paper No. 644 7/2009 HLERP 1, 2-3 (2009).

<sup>57</sup> The Companies Act, 2013, Act No. 18, Acts of Parliament, 2013, § 166(4).

<sup>58</sup> Vilasini Pollisetty, *The Case of Vijay Mallya and Kingfisher Airlines*, SPI (May 31, 2019, 21:25 PM), <https://7pillarsinstitute.org/the-case-of-vijay-mallya-and-kingfisher-airlines/>

of employee salaries<sup>59</sup> and finally, the company crumbled under internal chaos, financial turmoil and enforcement pressure. In *Dr. Vijay Mallya v. SEBI*<sup>60</sup>, it was contended that *prima facie* Mr. Mallya (as Chairman and Director) acted fraudulently towards public shareholders and investors in his business dealings. The Kingfisher case is a prime example of how the neglect of shareholder interests and those of stakeholders like employees, due to their conflict with the director's personal motives led to the eventual downfall of the company, thus contradicting the pluralistic approach in Section 166(2).

Another similar example is the Satyam scam, wherein Satyam Computer's Chairman and former Managing Director, Ramalinga Raju indulged in falsifying financial documents to create a false image of growth and profitability for shareholders and the public<sup>61</sup>. In *M/S. Satyam Computer Services Limited v. Directorate of Enforcement*<sup>62</sup>, it was observed that owing to the falsified reports of profits, a large outflow of company funds became necessary to satisfy obligations to shareholders and stakeholders like investors, employees, directors and customers. Further, as the scam was about to get uncovered, the board of directors went against shareholder interests and without their approval bought a major stake in a family-owned enterprise of Raju, which led to discontent and threats by the shareholders<sup>63</sup>. Ultimately, the Satyam scam's main victims were shareholders and stakeholders like employees, clients and bankers<sup>64</sup>, while the company remains steeped in litigation till date, thus undermining the pluralistic objectives of Section 166(2).

## 2. Conflict between majority shareholders and minority shareholders (AP-2)

In India, where companies often have a concentrated shareholding pattern, with control lying in the hands of select family members, the conflict between majority and minority shareholders under AP-2 is a common occurrence<sup>65</sup>. AP-2 occurs when the majority shareholders exercise their control and influence decisions in the company for their own gain while sacrificing the interests of minority shareholders and the overall firm. When viewed from the pluralistic approach given in Section 166(2), the phrases "benefit of its members as a whole", "best

---

<sup>59</sup> Anirban Chowdhury, *Kingfisher Airlines owes 3,000 employees Rs 300 crore in salary*, ECONOMIC TIMES (Mar. 10, 2016, 04:39 AM), <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/kingfisher-airlines-owes-3000-employees-rs-300-crore-in-salary/articleshow/51336437.cms?from=mdr>

<sup>60</sup> *Dr. Vijay Mallya v. SEBI*, 2017 S.C.C. OnLine SAT 107.

<sup>61</sup> Tanushree Jaiswal, *Satyam Scam*, 5PAISA (Jun. 28, 2023, 18:37 PM), <https://www.5paisa.com/blog/satyam-scam>

<sup>62</sup> *M/S. Satyam Computer Services Limited v. Directorate of Enforcement*, 2018 S.C.C. OnLine Hyd 787.

<sup>63</sup> Madan Lal Bhasin, *Corporate Accounting Fraud: A Case Study of Satyam Computers Limited*, 2(2) OJA 26, 30 (2013).

<sup>64</sup> Dr. Santosh Vadhrya, *Accounting Fraud with Reference of Satyam Company*, 12(1) IJARSCT 125, 127 (2020).

<sup>65</sup> Saptarshi Purkayastha and Rajaram Veliyath, *Primary and Secondary Agency conflicts in Family Firms: An empirical investigation*, Vol. 1 (2019) AOMP 1, 5-6 (2016).

interests of the company” and “the shareholders” implies that directors owe a fiduciary duty towards the company while considering *both* majority and minority shareholder interests. Moreover, Section 2(84)<sup>66</sup> which defines a “share” represents the general “interest of a shareholder in the company<sup>67</sup>”, without specifically distinguishing between a majority and minority shareholder. Keeping this in mind, AP-2 creates a major hindrance for application of the pluralistic approach as the majority shareholders control the board of directors and overall firm, which can lead to compromising the company interests along with those of minority shareholders.

The recent pending class action suit before the NCLT initiated by the minority shareholders of Jindal Polyfilms against the majority shareholders<sup>68</sup> against the sale of certain kinds of shares to promoter entities is a good example of how AP-2 intersects with and blocks the pluralistic model. The minority shareholders alleged oppression and mismanagement on behalf of the majority shareholders and a violation of their fiduciary duties<sup>69</sup> which led to an overall loss to the company’s profits and in turn, to themselves.

The ongoing legal battle in Tata Sons Limited is another instance<sup>70</sup>; In *Cyrus Investment Pvt. Ltd. v. Tata Sons*<sup>71</sup>, it was contended that the majority shareholder group acted in a manner “prejudicial to the interest of the Company adversely affecting the interest of the members, including the minority members”, and the Court while affirming the above, noted that Section 166 outlines the duty of directors to avoid conflicts of interest and to serve independently in the best interests of the company and not as a “mouthpiece” to nominees.

In both the above cases, AP-2 has negatively impacted the company’s best interests and failed to balance the interests of all shareholders in the company’s functioning and management, thus contradicting the envisaged purpose of Section 166(2).

### 3. Conflict between the firm and third-party stakeholders (AP-3)

AP-3 arises from conflicts between the firm, particularly its owners or shareholders and external

---

<sup>66</sup> The Companies Act, 2013, Act No. 18, Acts of Parliament, 2013, § 2(84).

<sup>67</sup> THE INSTITUTE OF COMPANY SECRETARIES OF INDIA, SHARE CAPITAL AND DEBENTURES 1. (See <https://www.icsi.edu/media/portals/0/SHARE%20CAPITAL%20AND%20DEBENTURES.pdf>)

<sup>68</sup> Ayaan Kartik, *Jindal Poly Films Case: Two More Shareholders Seek to Join Class Action Suit Against Company*, OUTLOOK BUSINESS (Aug. 15, 2024, 10:18 AM), <https://www.outlookbusiness.com/corporate/jindal-poly-films-case-two-more-shareholders-seek-to-join-class-action-suit-against-company>

<sup>69</sup> Isha Khurana, *Jindal Polyfilms and ICICI Securities: A Shift in the Indian Saga of Class Actions?*, CCL (Sep. 9, 2024, 02:26 AM), <https://ccl.nluo.ac.in/post/jindal-polyfilms-and-icici-securities-a-shift-in-the-indian-saga-of-class-actions>

<sup>70</sup> Umakanth Varottil, *Unpacking the Scope Of Oppression, Prejudice And Mismanagement Under Company Law In India*, NUS Law Working Paper 2020/020 1, 3-4 (2020).

<sup>71</sup> *Cyrus Investment Pvt. Ltd. v. Tata Sons*, 2019 S.C.C. OnLine NCLAT 858.

third parties like creditors, employees, customers and the environment. The conflict lies in ensuring that the firm does not act opportunistically by exploiting these stakeholders, whether through “expropriating creditors, mistreating workers, misleading consumers<sup>72</sup>” or damaging the environment. When viewed through the lens of the pluralistic approach in Section 166(2), AP-3 leads to indifference towards the interests and welfare of stakeholders at the hands of the company’s board of directors controlled by the shareholders. Further, the principle and theory of CSR is also compromised as the company seeks to only serve its own primary interest of profit maximisation and survival<sup>73</sup> at the cost of stakeholder interests.

In this regard, the Bhopal Gas Tragedy which took place at Union Carbide’s (UC) pesticide plant can be analysed. In the period of time leading up to the fatal gas leak, UC flouted several safety guidelines and neglected standard practices of running the plant in order to cut costs and increase company profits<sup>74</sup>. Some of these instances of cost cutting included understaffing<sup>75</sup>, usage of defective, sub-par safety equipment, faulty valves<sup>76</sup> and obsolete machinery, with several accidents involving employees occurring without any solutions or repairs to any of the above<sup>77</sup>. Finally, as noted in the settlement proceedings of *Union Carbide Corporation v. Union of India*<sup>78</sup>, the gas leak adversely impacted thousands of stakeholders including UC’s officers, employees, agents, citizens, the community and the environment at large.

Though it might satisfy the first part of Section 166(2) in promoting the company’s objects for the benefit of its members as a whole, AP-3 goes against Section 166(2) read with Section 135 as it leads to failure of the director’s positive duty to consider and take stakeholder interests into account<sup>79</sup> while meeting the company’s best interests.

#### 4. Other Lingerling Issues:

##### Deep-Rooted Profit Maximisation Motive

Even though the traditional role of companies aiming for profit maximization has expanded to

---

<sup>72</sup> Dott. Tomasi Tania and Prof. Lolli Andrea, *Agency Problems In Troubled Companies: A UK-Italy Comparison*, Scientific Disciplinary Sector IUS/O4 1, 14 (2009). (See <https://sfera.unife.it/retrieve/e309ade1-d8f8-3969-e053-3a05fe0a2c94/306.pdf>)

<sup>73</sup> DR. AREMU MUKAILA AYANDA, *NATURE, PURPOSE AND SCOPE OF BUSINESS* 1, 5, 6 (Gunu, U, Kasum, A. S. & Mustapha, I. Y, edn. 1 2015).

<sup>74</sup> *The Bhopal Disaster: The Human Cost of Cutting Corners*, WKPS (Mar. 13, 2019, 17:16 PM), <https://waterskraus.com/bhopal-disaster-human-cost-cutting-corners/>

<sup>75</sup> *Bhopal disaster*, BRITANNICA (Sep. 10, 2024, 17:20 PM), <https://www.britannica.com/science/pollution-environment>

<sup>76</sup> Edward Broughton, *The Bhopal disaster and its aftermath: a review*, 4(6) EIJ 1, 2 (2005).

<sup>77</sup> Radhika Ramaseshan, *Profit against Safety*, 19 (51/52) EPW 2147, 2147-2148 (1984).

<sup>78</sup> *Union Carbide Corporation v. Union of India*, (1991) 4 S.C.C. 584.

<sup>79</sup> Shelley Marshall and Ian Ramsay, *Stakeholders and Directors’ Duties: Law, Theory and Evidence*, 35(1) UNSWLJ 291; 291, 292, 296, 298 (2012).

incorporate managerial responsibilities broader than merely “an association of capital<sup>80</sup>”, the pursuit of profit still remains deeply rooted in the minds of directors and shareholders alike. In fact, many even outside the company’s domain<sup>81</sup> believe that the most effective way for companies and directors to flourish is through a singular focus of maximizing profits<sup>82</sup>. This persistent focus of profit maximisation leads to a paradoxical conflict with the pluralistic approach under Section 166(2), particularly in AP-3, where directors might succeed in promoting company objects like profit maximisation for the benefit of shareholders but fail to consider the best interests of various stakeholders as they are perceived to oppose the goal of profit-making.

### **Conflict of Interest Within Stakeholders**

Another unanswered loose end of the pluralistic approach in Section 166(2) is that it does not specify how to balance competing or conflicting interests within the various stakeholders for the company’s benefit. For example, profit maximisation for shareholders may lead to cost-cutting that negatively impacts employees or compromises the environment and vice-versa. In both scenarios, the party benefiting will argue that the directors have succeeded in acting in the best interests of the company while the prejudiced party will argue the opposite, leaving directors in a difficult position of uncertainty.

## **IV. SUGGESTIONS FOR CONSIDERATION**

Based on the above, it is evident that the pluralistic approach in Section 166(2) lacks in several aspects and there is an urgent need to devise solutions to tackle the prevailing problems. While enabling stakeholders a legal route in filing derivative suits or shifting the standard of directors’ duties from a subjective to an objective one might seem to be the need of the hour, this will not quite solve the problem as it could set off further legal complexities, thus becoming a double-edged sword in the hands of stakeholders. However, there are other suggestions which can be considered, especially in the context of agency problems:

- Balancing profit maximization with CSR through strategies like ethical investments, transparent reporting, regulatory compliance, community engagement and stakeholder involvement.

---

<sup>80</sup> Panchmahals Steel Limited v. Universal Steel Traders, 1975 S.C.C. OnLine Guj 26.

<sup>81</sup> *Controversy Over Profit Maximisation Objective*, UNIVERSITY OF MYSORE (Oct. 3, 2024, 00:22 AM), <http://uni-mysore.ac.in/mlrccvideos/014.%20Principles%20of%20Economics/Text-L/Lesson%2076,77%20&%2078.pdf> (See pg. 1-2)

<sup>82</sup> Milton Friedman, *A Friedman doctrine-- The Social Responsibility of Business Is to Increase Its Profits*, NY TIMES (Sep. 13, 1970, 00:19 AM), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>

- Every company must strive to have a stakeholder panel/board to learn and understand stakeholder interests and aim to align the same with company objectives.
- Formulate an amendment to clearly define stakeholders in Section 166(2) and a mechanism for balancing competing interests between them.
- Either the legislature through an enactment or judiciary via interpretation of the law can devise clear, unambiguous standards of scrutiny for directors and performance of their duties with respect to the company and its various stakeholders.
- Companies and their directors can keep feedback channels open so that stakeholders can provide feedback and reports on company practices, leading to more informed and balanced decision-making while keeping stakeholder interests in mind.

## **V. CONCLUSION**

The pluralistic approach of corporate governance in Section 166(2) of the Companies Act, 2013 occupies a significant position in the corporate landscape of India with multiple strengths tied to its principle and theory. However, the quest for perfection still remains as multiple loopholes riddle the provision. Amongst these issues, the three agency problems in companies pose a serious threat and undermine the effectiveness and application of the pluralistic approach leading to challenges for parties engaged in the corporate sphere. Further, with other prevailing problems remaining unsolved, we are likely to see increased occurrences of agency problems in companies owing to the dynamic nature of the corporate world, thus making it a priority to come up with viable solutions. Finally, the success of a law is tested on the anvil of its implementation and until such time the pluralistic approach in Section 166(2) is not reformed for the better, it will remain a toothless paper tiger in the corporate jungle.

\*\*\*\*\*